United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7423

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

No. 76-7423

GWENDOLYN SHELTON, on her own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

- against -

J. HENRY SMITH, et al.,

Defendants-Appellees.

BRIEF & APPENDIX

BRIEF FOR APPELLANTS ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (DUFFY, J.). The decision of the Court below is not officially reported, but is attached as an Addendum to this brief.

The Court below abstained, pending a determination of plaintiff-appellant's claims in the New York State Courts. The Court also declined to convene a three-judge court and denied plaintiff-appellant's motion for injunctive relief pending the convening of the three-judge court. This Court has jurisdiction of this appeal 28 U.S.C. § 1292 (a) (1), Mengelkoch v. Industrial Welfare Commission, 393 U.S. 83, 83-84 (1968), Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, n. 2 (1962).

ISSUES PRESENTED

(1) Did the Court below err in finding that a single judge could prcperly abstain in a matter otherwise required to be heard by a three-judge court?

(2) Did the Court below err in invoking the abstention doctrine on the following grounds: (a) the possibility that pending state proceedings would eventually cause the federal action to become moot for lack of a plaintiff with proper standing; (b) the possibility that a state court would grant plaintiff the same relief she sought in federal court.

(3) Did the Court below err in denying plaintiff's motion for a three-judge court?

(4) Did the Court below err in denying plaintiff's motion for an injunction permitting her to see her children pending convening a three-judge court?

STATEMENT OF THE CASE

A. Proceedings To Date

Plaintiff-Appellant (Appellant") appeals from an order entered in the Southern District of New York on August 12, 1976, in which the HONORABLE KEVIN T. DUFFY, in accordance with his opinion of the same date, abstained from determining Appellant's claims, and denied Appellant's motion for injunctive relief pending convening a three-judge court. Based on its decision to abstain, the Court below denied the motion to convene a three-judge court. The Court did not dismiss the action, but retained jurisdiction of the matter pending completion of the state court proceedings.

Appellant GWENDOLYN SHELTON initiated this action on July 7, 1976 on behalf of herself and all other parents of children in foster care supervised by the defendants-appellees City and State Departments of Social Services. Appellant is seeking in this proceeding to challenge the procedures followed by defendants-appellees to terminate the right of parents to visit their children in voluntary, temporary foster care. Jurisdiction was invoked under 28 U.S.C. § 1343 (3) and (4) and under 28 U.S.C. § 1331.

Appellant requested declaratory and injunctive relief against enforcement of New York Social Services Law § 383.2 on the ground that this state law authorized the defendants to

terminate parental visiting rights without requiring prior notice or a hearing. Appellant alleged that this law violated associational and parental rights under the First, Ninth, and Fourteenth Amendments, and under the Social Security Act.

On July 12, 1976, almost immediately after this action was commenced, defendant-appellee EDWARDS of the Spence-Chapin agency commenced proceedings in the Family Court of the State of New York, New York County, to declare Appellant's two children in foster care abandoned or permanently neglected (Matter of James Adams, Docket No. B2895/76; Matter of Alexander Jewett, Docket No. B-2895/76). These proceedings are now pending.

On July 14, 1976, Appellant moved the District Court for an order convening a three-judge court, permitting the action to be maintained as a class action and for an order enjoining the defendants-appellees from denying her the right to visit her children, without prior notice and a prior hearing, pending the convening of a three-judge court.

The Court below concluded it should "abstain from consideration of this action until all state proceedings are completed." (A-4). For this reason, the Court declined to request the convening of a three-judge court. The Court below also denied Appellant's motion for an injunction permitting visiting on the ground that in view of the Court's abstention, it was "unwilling to interfere with the status quo until after the Family Court has spoken."

Appellant timely appealed to this Court. On September 14, 1976, Appellant's motion for a preference on appeal was granted; her motion for injunctive relief pending appeal was denied.

B. Factual Allegations

Appellant GWENDOLYN SHELTON is the mother of four children. Two of these children, James (age three) and Alexander (age six), are in foster homes supervised by the Spence-Chapin Services to Families and Children ("Spence-Chapin") on behalf of the New York City Department of Social Services. The entire program is under the auspices of the New York State Department of Social Services, which in turn receives partial federal reimbursement for its foster care services pursuant to the Social Security Act.

The children were placed voluntarily by Appellant because of family and financial problems. Appellant's son James was placed on August 17, 1973; Alexander was placed on April 16, 1973, returned home on June 7, 1974, and again placed on advice of Spence-Chapin on June 3, 1975.

Appellant had always been permitted to see her children. But beginning in June, 1975 Appellant began to have difficulty with Spence-Chapin in arranging for visits with her children. Visits were denied or postponed on various grounds, such as illness of the children or difficulty in making arrangements for the visits. Finally in December, 1975 Appellant was informed by Spence-Chapin that they had decided to terminate her visits with both children, and planned to take steps to free the children for adoption.

There was no prior notice of the intention to terminate Appellant's visiting rights and no notice of the reasons for the termination. Appellant had no opportunity for a prior judicial or administrative hearing to challenge the proposed termination of her rights, as no such prior hearing is provided. Appellant then initiated this proceeding to challenge alleged constitutional infirmities of the procedures followed in terminating parental visiting rights.

NEW YORK STATE STATUTE

New York Social Welfare Law § 383 (2):

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child. . . .*

* "Place out" and "board out" are defined in Social Services Law §§ 371.12 and 371.14. "Place out" means to arrange for free care for a child in a family, other than his own or certain specified relatives; "board out" means to arrange for care in a family to whom payment is made. "Authorized agency" is defined in Social Services Law § 371.10 to include both private organizations, courts, and public welfare officials authorized by law to place and board out children.

POINT I.

THE DISTRICT COURT BELOW ERRED IN ABSTAINING IN A MATTER OTHERWISE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT

The Court below ruled that a single judge may invoke the abstention doctrine even though the case would otherwise be proper for the convening of a three-judge court (A-4, fn. 2). This ruling is in error; it is well established that the question of whether to abstain, going as it does to the merits, is for the three-judge court and not the single judge. Steffel v. Thompson, 415 U.S. 452, 457 n. 7 (1974); Abele v. Markle, 452 F. 2d 1121 (2d Cir., 1971); New York State Waterways Assn. Inc. v. Diamond, 469 F. 2d 419 (2d Cir., 1972); McRedmond v. Wilson, 533 F. 2d 757, 764 (2d Cir., 1976); Sugar v. Curtis Circulation Co., 377 F. Supp. 1055, 1061 (S.D.N.Y., 1974).

The single judge asked to convene a three-judge court is limited to determing (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case otherwise comes within the requirement of the three-judge statute. Idlewild Bon Voyage Liquor Corp. v. Epstein, supra; Abele v. Markle, 452 F. 2d 1121 (2d Cir., 1971).

Judge DUFFY below relied solely on Reilly v. Doyle, 483 F. 2d 123, 127 (2d Cir., 1973) as authority permitting a

single judge to refuse to exercise federal jurisdiction. His reliance was misplaced. In Reilly, the plaintiff sought to enjoin a pending state prosecution on the ground of the unconstitutionality of various state and local statutes. The Second Circuit affirmed the decision of the District Court dismissing the complaint, holding that under the comity doctrine of Younger v. Harris, 401 U.S. 37 (1971) the federal court should not enjoin a pending state prosecution. In contrast, the instant case does not involve the comity doctrine since it does not seek to enjoin any state proceedings. The only state proceedings pending here, the permanent neglect proceeding in Family Court, does not involve the challenged statute in any manner: it deals with the issue of whether the children should ultimately be put up for adoption, not whether the mother has a right to a prior hearing before being deprived of the right to visit. Plaintiff does not seek to interfere with the permanent neglect proceeding. Reilly therefore is entirely distinguishable from the instant case and is not authority for the District Court's departure from the usual rule that abstention is a matter for the three-judge court.

POINT II.

ABSTENTION IS IMPROPER AS THE NARROWLY LIMITED SPECIAL CIRCUMSTANCES WHICH MAY WARRANT USE OF THE ABSTENTION DOCTRINE ARE NOT PRESENT IN THIS CASE

As is discussed in POINT I. above, a single judge may not properly abstain in a matter required to be determined by a three-judge court. Thus this case must go back to the District Court to determine whether to convene a three-judge court. But it would be an exercise in futility for the Appellant to succeed in having a three-judge court convened, only to have the three-judge court then abstain. Similarly, it is possible that the District Court would first determine that a three-judge court was not required, that the merits could be decided by a single judge, and then the Court would again abstain. For these reasons, and because this Court would have appellate jurisdiction over any abstention decision by the three-judge court, MTM, Inc. v. Baxley, 420 U.S. 799 (1975), or by a single judge, this Court should now reach the question of whether abstention is proper.

The Court below erred in abstaining. Two reasons were given for abstaining. First the Court asserted that if the Family Court proceedings now pending against Appellant ultimately resulted in a termination of her parental rights as to her children in foster care, this action would "be moot for

want of a plaintiff with proper standing" (A-4). Second, the Court held that abstention was proper because it is possible that a state court could conclude that either the challenged state statute or some other state law could be interpreted to require a hearing prior to terminating parental visiting rights, (A-5). Neither of these two grounds will stand careful scrutiny.*

First, even assuming that the result of the Family Court proceedings might moot the case in the future,** this is not a proper ground for abstention. Indeed, the possibility of the delays inherent in abstention abrogating the relief sought in federal court is a reason to not abstain. See Smith v. Cherry, 489 F.2d 1098, 1101 (7th Cir., 1973), cert. den., 417 U.S. 910 (1974), Zwickler v. Koota, 389 U.S. 248, 252 (1967).

The second ground for abstention suggested by the Court below is also erroneous. The Court abstained because of an unsettled issue of state law, which the Court held must first be determined by a state court. The unsettled issue found by

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* Unfortunately, as no motion to abstain had formally been made below, the District Court did not have any briefs from the parties on the abstention issue.

** This is by no means certain, even if Appellant ultimately loses in Family Court. Appellant has moved to have the case certified as a class action, and this may prevent the case from becoming moot as to the class. See, e.g. Frost v. Weinberger, 515 F.2d 57, 62-65 (2d Cir., 1975), cert. den., ____ U.S. ____, 96 S. Ct. 1435 (1976).

the Court below is whether either the challenged statute or some other state law could be interpreted to require the prior hearing which Appellant seeks. But, as was recently reaffirmed in this Circuit in McRedmond v. Wilson, supra, at 760:

> It is a pillar of federal jurisdiction that one having a bona fide claim is normally entitled as a matter of right to have the claim adjudicated by a federal tribunal and that this right may not be defeated by relegating the matter to the state court or by requiring the plaintiff to exhaust state remedies. McNeese v. Board of Education for Com. Unit School District 187, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

Abstention is a narrow exception to this principle and is generally proper only if three conditions are met: that the state statute be unclear or the issue of state law uncertain, that resolution of the federal issue depend upon the interpretation to be given state law, and that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue, McRedmond v. Wilson, supra, at 761. These standards are not met here.

The challenged section of law, Social Service Law § 383.2, is not unclear so that it would be susceptible to state court interpretation that it requires a hearing when the

"custody" this section grants is exercised to deny parental visiting with children in foster care. Nothing in the statute requires or even suggests a hearing be conducted. The case is, in this respect at least, similar to other prior hearing cases where state statutes were invalidated for omitting any requirement for an adequate prior hearing, although of course none of the statutes challenged in the other prior hearing cases contained a recital that such prior hearing was prohibited. See, eg. Goldberg v. Kelly, 397 U.S. 254 (1970), OFFER v. Dumpson, 411 F. Supp. 1144 (1976) (three-judge court). As in Wisconsin v. Constantineau, 400 U.S. 436, 439 (1971), the challenged law:

> does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some constructions but not under others. . . where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.

The Court also abstained because other state law provisions might mandate a hearing. The Court relied on the recent Supreme Court opinion in Boehring v. Indiana State Employees Ass'n Inc., 423 U.S. 6 (1975), in which a state employee sought to enforce an alleged constitutional right to a hearing

prior to dismissal for cause from employment. The Court held that another section of state law which generally provided for administrative hearings might fairly be read to extend such hearing rights to the employee thereby making a constitutional determination unnecessary. For this reason, the Court held abstention was proper.

Boehring is not applicable to the facts of this case. There is no state prior hearing procedure as to which there is any question of state construction which would make unnecessary a determination of the constitutional issues. There is, of course, a possibility that a state court would grant Appellant the relief she seeks here as to one or both of the children, but this is not a ground for abstention if no issue of state law is unclear.

There are two perfectly clear state law grounds on which a state court could grant some relief in a proper action. First there is the guarantee in the New York State Constitution that "no person shall be deprived of life, liberty or property without due process of law," New York Constitution Article 1 § 6. This section, identical with the United States Constitution, may suggest that the state court might also recognize the right to the prior hearing Appellant claims, but, as the Court held in McRedmond v. Wilson, supra, at 763, "it is now settled that when state and federal laws overlap in this fashion, plaintiffs are not precluded from

seeking the federal forum." The possibility that a state court may take tne initiative in striking down its own laws is no ground for abstention, Wisconsin v. Constantineau, supra, Procunier v. Martinez, 416 U.S. 396, 400-401 (1974).

The other state law ground under which Appellant would possibly be entitled to relief in state court applies only to one of Appellant's children, but also is clear. This is the requirement in New York Social Services Law § 384 (a) that the authorized agency to which custody is voluntarily given by the parents obey the terms of the written instrument transferring custody.* Since the instrument placing Appellant's son Alexander provides that Appellant has the right to visit, this state law provision is the basis of a pendent claim in the federal proceeding. The claim has been made even stronger by a recent amendment to the section prohibiting termination of visitation without an amendment to

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* "The care and custody of a child may be transferred by a parent or guardian to an authorized agency by a written instrument in accordance with the provisions of this section . . . The instrument shall be upon such terms and subject to such conditions as may be agreed upon by the parties thereto . . ." Social Services Law § 384 (a).

the instrument of placement or a court order.*

But it is established that a pendent state law claim is not a ground for abstention if the state law issues are clear. As the Supreme Court stated in Davis v. Mann, 377 U.S. 678, 690-691 (1964).

> Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. McNeese v. Board of Education, 373 U.S. 668. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked.

Furthermore, the pendent state statutory claim applies only to one of Appellant's children, as the other child was placed at a time when the instrument of placement made no provision for visiting. While the state constitutional claim

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* The amendment to Social Services Law § 384 (a) reads in pertinent part as follows:

"(b) No provisions set forth in any such instrument regarding the right of the parent or guardian to vist the child ... may be terminated or limited by the authorized agency having the care and custody of the child unless: (i) the instrument shall have been amended to so limit or terminate such right, pursuant to subdivision three of this section; or (ii) the right of visitation or to such services would be contrary to or inconsistent with a court order obtained in any proceeding in which the parent or guardian was a party." (McKinney's Session Laws of 1976 ch. 669).

Appellant is amending her complaint to reflect the amendment to the law.

applies to both children, the claim is identical with the federal constitutional claim and thus is not a proper ground for abstention, McRedmond v. Wilson, supra, at 763.

There are additional grounds also which militate against abstention here. There is the inevitable delay which results from abstention, during which time Appellant will be deprived of any opportunity to see her children. The Supreme Court has held that the delay and hardship attendant on abstention is a relevant factor in deciding whether to abstain. See Baggett v. Bullitt, 377 U.S. 376, 378-9 (1964).

Another consideration militating against abstention is the inadequacy and uncertainty of Appellant's state remedies. In addition to the other preconditions for abstention, a federal court may abstain only if there exists a "plain, adequate and complete" remedy in the state courts. Wright v. McMann, 387 F.2d 519, 523 (2d Cir., 1967), Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir., 1968). Thus, commencing with Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), the federal courts have regularly analyzed the adequacy of the state remedy prior to deciding whether abstention was appropriate. See McNeese v. Board of Education for Comm. Unit School District 187, supra, at 675 (Illinois School Code held inadequate remedy); Wright v. McMann, supra, (Article 78 proceeding challenging prison con-

ditions held inadequate).*

There are no adequate or plain remedies in the state court. While Family Court proceedings are now pending (having been commenced after this action was filed), these proceedings are to permanently terminate Appellant's custody of her children; the proceedings do not involve the statute challenged here in any way.** Nor is it clear that the Family Court could entertain a motion for visiting rights pending disposition of the permanent neglect and abandonment actions. Further, even if the Appellant could now move in the Family Court proceeding for an order permitting visiting, this would not give her the relief which she seeks in federal court; namely declaratory and injunctive relief that visiting not be terminated without prior notice and hearing. Declaratory judgment is not available in Family Court. Loomis v. Loomis, 262 A.D. 906 (2d Dept., 1941) rev'd on other grounds, 288 N.Y. 222; Carbone v. Carbone, 166 Misc. 924 (Dom. Rel. Ct., Fam. Ct. Div., Bronx Co., 1938). Appellant would have

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* Of course the availability of a state court remedy can not be used to require Appellant to exhaust state judicial remedies before commencing a civil rights action. Monroe v. Pape, 365 U.S. 167 (1961).

** The Court below stated that it was expressing "no opinion as to whether plaintiff's claims can or should be raised in the pending Family Court action or whether a separate action would be necessary." (A-6).

the same difficulty in any separate action she may bring in state courts -- while she might eventually get a judicial hearing on the merits of the termination of visiting in her case, she would not vindicate her right (or the rights of the class she seeks to represent) to notice and a hearing before any future terminations of visiting rights. A further problem is that declaratory judgment regarding children has been held to be unavailable in the state courts when a proceeding involving the same children is pending in Family Court. Matter of Dale v. Dumpson, Index No. 14692/74 (Spec. Term, Part I, Sup. Ct., Kings Co., 1/21/75), aff'd, 372 N.Y.S. 2d 978 (App. Div., 2d Dept. 1976).

Further, cases such as this involving vital questions of civil rights are the least likely candidates for abstention. Mayor v. Educational Equality League, 415 U.S. 605, 628 (1974); Zwickler v. Koota, 389 U.S. 241, 248 (1967), Wright v. McMann, supra. This is particularly so when the plaintiff seeks relief not only for herself but for thousands of others, who do not have easy access to lawyers and courts, Holmes v. New York City Housing Authority, supra, at 268.

Finally, the Courts are traditionally mindful of the "high cost of abstention" when First Amendment issues are at stake, Procunier v. Martinez, supra, at 404 (1974). Procunier invalidated California prison regulations allowing prison officials to censor and withhold prisoner mail without

procedural safeguards. Surely the right of a mother to communicate with her children in foster care is as important as the prisoners' rights involved in Procunier.

For these reasons none of the conditions of abstention are met. There is no unclear state law; there are no state proceedings which could effectively vindicate Appellant's rights while avoiding a constitutional determination; and the hardship and delay resulting from abstention would be enormous. This Court should direct that the merits of the action be considered.

POINT III.

THE COURT ERRED IN DECLINING TO CONVENE A THREE-JUDGE COURT

The Court below ruled that "apart from the other possible barriers to the convening of a three-judge court, none is required in light of my decision to abstain." (A-4). The refusal to convene a three-judge court is erroneous.

This action was commenced prior to the three-judge court amendments of August 12, 1976. Thus a three-judge court is required under former 28 U.S.C. § 2281 because Appellant seeks an injunction, on constitutional grounds,* against enforcement of state law and polices of statewide applicability. Idlewild Bon Voyage Liquor Co. v. Epstein, supra. The Challenged section of law is New York Social Services Law § 383.2 which authorizes the challenged practice of terminating visiting rights to parents of children in foster care, without prior notice and hearing. Pursuant to this statute, authorized agencies, such as Spence-Chapin in Appellant's case, exercise unbridled discretion to grant or deny visiting rights to natural parents of children in the custody of the

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* Appellant also has asserted both state and federal statutory claims, but neither of these is sufficient to resolve the entire controversy. As is discussed in Point II, supra, the state law claim applies to only one of Appellant's two children in foster care. The federal statutory claim is based on the Social Security Act's requirement that states encourage the care of children in their own homes; this is not alone sufficient to entitle Appellant to relief.

agency. The statute does not require the agency to provide notice or a hearing prior to terminating visiting rights, and the agencies do not in fact provide such notice or hearings. The statute includes no safeguards against arbitrary action by the agency in terminating visiting rights.

The power to terminate visiting rights is included in the challenged statute's broad grant of general authority over custody. But a three-judge court is required even in the absence of clear statutory authority for the challenged practice. A state policy and practice against which an injunction is sought is treated as an "order made by an administrative board or commission acting under state statutes" within the terms of 28 U.S.C. § 2281, and requires a three-judge court. Maggett v. Norton, 519 F. 2d 599 (2d Cir., 1975). Maggett held that a challenge to Connecticut welfare department procedures, not embodied in formal regulations, required a three-judge court since injunctive relief was sought. See also Sands v. Wainwright, 491 F. 2d 417 (5th Cir., 1973) (en banc) in which the court held that a challenge to statewide prison procedures, not embodied in published regulations, required convening a three-judge court. Cf., Leonard v. Mississippi State Probation and Parole Board, 509 F. 2d 820 (5th Cir., 75) (no challenge to administrative rules on their face or as applied; three-judge court not required).

Unless the federal questions are clearly insubstantial, frivolous, or foreclosed by a recent Supreme Court decision,

a single federal judge to whom the issue is presented must convene the statutory panel. The standard to be applied in assessing the substantiality of the federal question has been reiterated recently by the Supreme Court in Goosby v. Osser, 409 U.S. 512 (1973)

> "Constitutional insubstantiability" . . . has been equated with such concepts as "essentially fictitious", . . ."obviously without merit". The limiting words "wholly" and "obviously have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'". Id. at 518. (Citations omitted.)

The constitutional challenge here is far from frivolous. Courts have placed the highest value on family integrity and parental rights to a relationship with one's children. Meyer v. Nebraska, 262 U.S. 390 (1923), Armstrong v. Manzo, 380 U.S. 545 (1965), Stanley v. Illinois, 405 U.S. 645 (1972).

Visitation between a parent and a child absent from the home is in and of itself part of the constitutionally protected parental right. The importance of visitation rights is reflected in the law by the recognition that visitation is itself a form of custody. See, e.g., in New York, People ex rel. Herzog v. Morton, 287 N.Y. 317, 39 N.E. 2d 255 (1942); People ex rel. Meredith v. Meredith, 272 App. Div. 79, 87, 69 N.Y.S. 2d 462 (2d Dept.), aff'd, 297 N.Y. 692 (1947).

The requirement of a prior hearing before a person can be deprived of important rights is now well established. See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970), Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), Escalara v. New York City Housing Authority, 425 F. 2d 853 (2d Cir., 1970). Thus the Courts have protected rights, such as tenancy, much less essential than the human rights at stake here. The failure of the appellees to provide any notice or hearing prior to terminating rights as basic as the family rights involved in this case clearly presents a substantial constitutional issue.

The challenged statute suffers from another constitutional infirmity also. The statute does not include any standards to guide the agencies administering foster care in making decisions about visitation, nor are there other statutes or regulations to provide clarification. Thus the statute operates to inhibit parents in exercising their

familial and First Amendment rights to visit their children, since the parents have no idea what conduct may precipitate a denial of visiting.* As the Court held in Alsager v. District Court of Polk County, 406 F. Supp. 10, 19 (S.D., Iowa, 1975) (invalidating a child neglect statute on vagueness and other grounds):

> Wary of what conduct is required and what conduct must be avoided to prevent termination [of custody], parents might fail to exercise their rights freely and fully. The risk that parents will be forced to "steer far wider of the unlawful zone" than is constitutionally necessary is not justified when the State is capable of enacting less ambiguous termination standards.

Of course, this risk of inhibiting lawful parental conduct is even greater in the foster care situation, where the parents know their visits and conduct are subject to continuous social worker scrutiny.

Thus, the statute gives broad power to the agencies, with no standards to inform and guide the exercise of this power. The agencies are free to deny visiting to parents for

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* Statutory vagueness of this nature is not a ground for abstention, as was made clear in Baggett v. Bullitt, supra, 377 U.S. at 376-378. Where a statute is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them, abstention is not required. Id. at 378. See also Procunier v. Martinez, supra.

any or no reason. In numerous cases, Courts have invalidated statutes which delegated broad power over the exercise of constitutional rights when the statutes failed to include precise and explicit standards to protect against arbitrary action. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating statute empowering State officer to decide whether cause is "religious" to permit solicitation for it); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (Statute prohibited picketing and loitering); Hynes v. Borough of Oradell, ____ U.S. ____, 96 S. Ct. 1755 (1976) (ordinance regulating solicitation for "campaign or cause"). See further, Hornsby v. Allen, 326 F. 2d 605 (5th Cir., 1964) (vagueness of requirements for liquor license); Tyson v. New York City Housing Authority, 369 F. Supp. 513 (S.D.N.Y., 1974) (vagueness in eviction standards and procedures); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1967).

For these reasons, Appellant's challenge to Social Services Law § 383.2 is neither frivolous nor foreclosed by prior decisions, and a three-judge court is therefore required.

POINT IV.

THE COURT ERRED IN DENYING APPELLANT AN INJUNCTION TO PERMIT HER TO VISIT HER CHILDREN

The Court below also erred in denying the Appellant's motion for a temporary order enjoining appellees from denying Appellant visiting rights without notice or hearing. A single judge has the power to grant such an order pending convening a three-judge court "to prevent irreparable damage" 28 U.S.C. § 2284.

Appellant more than meets the standard for preliminary relief set forth in Sonesta International Hotels Corporation v. Wellington Associates, 483 F.2d 247, 250 (2d Cir., 1973):

> The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

See also Hamilton Watch Company v. Benrus, 206 F.2d 738 (2d Cir., 1953), Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir., 1969), cert. den., 394 U.S. 999 (1969).

Here, Appellant has shown a strong probability of success on the merits (See POINTS I.-III, Supra.). Further, the balance of hardships tips overwhelmingly toward the Appellant.

The deprivation to the parent of any contact with her children inevitably causes emotional turmoil and pain to both parent and child. No future remedy can change the fact that visits missed now can never be restored. Further, the denial of visiting increases the probability that the parent will be deprived of her child permanently.* The harm is irreparable.

In contrast, the burden on the defendants is minimal, and consists only of arranging a convenient time for the children to be brought to the Spence-Chapin agency for a visit. Despite this, the Court below denied temporary relief based on the Court's "opinion that there is a greater possibility of emotional harm to the two children, Alexander and James, in mandating them to visit their natural mother on the ere of a possible permanent separation" (A-6). The Court relied for this conclusion on the opinion in recently published and controversial book, Beyond the Best Interest of the Child by Goldstein, Freud and Solnit, that a permanent separation

*Even if a parent is found guilty of permanent neglect entitling the Family Court to permanently terminate custody (Family Court Act § 611 et seq.), such judgment may be suspended in the best interests of the child, Family Court Act § 631. The chances of such suspended judgment being imposed increase immeasurably if the parent and child have been visiting.

between parent and child is best made in a manner which is total and complete.

The conclusions of the Goldstein-Freud-Soln[illegible] book relied on are not uniformly accepted,* but even more importantly there has been no permanent separation of Appellant and her children. Appellant may well be successful in defending the Family Court proceeding to permanently terminate her custody of the children. Thus the Court incorrectly denied injunctive on the basis of a highly speculative future event which if it occurred might possibly make the childrens' adjustment to the loss of their mother more difficult.

But the harm from denial of injunctive relief is not speculative or dependent on future events which may or may not occur. It occurs now, to the Appellant and probably to her children,** regardless of the outcome of the Family Court proceedings; it may even affect the outcome of the Family Court proceedings.

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* The Goldstein-Freud-Solnit book (which is theoretical and not based on empirical studies) has been very controversial. See, for example of critiques of the book, Katkin, Bullington and Levine "Above and Beyond the Best Interests of the Child: An Inquiry Into the Relationship Between Social Science and Social Action" 8 LAW AND SOCIETY REV. 669 (Summer, 1974), Kadushin "Beyond the Best Interests of the Child: An Essay Review" 48 SOCIAL SERVICES REVIEW 508 (December 1974).

** Many experts have discussed the crucial importance to foster children of continued contact with their natural parents. See, for example Eugene A. Weinstein The Self Image of the Foster Child, (Russell Sage Foundation, New York, 1960).

It should be emphasized that the children in fact know Appellant and had visited with her prior to the termination of visiting complained of here. It should also be emphasized that visiting occurs at the Spence-Chapin agency under their supervision. Further, if Spence-Chapin still deems the harm to the children from seeing their mother to be immediate, the agency always retains the option of attempting to terminate the Appellant's rights by a motion in Family Court, preceded by proper notice, which would result in a hearing before an impartial decision-maker and which should satisfy Appellant's objections to the arbitrary procedures previously followed in this case. For these reasons, there can be no harm to the appellees except minimal inconvenience; there is certain, immediate and irreparable harm to the Appellant who is being denied any communication with her two sons. It was error to deny the injunction.

CONCLUSION

For the above reasons, the decision of the Court below should be REVERSED.

Dated: September 24, 1976
Brooklyn, New York

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

GWENDOLYN SHELTON, on her own behalf and on behalf of all others similarly situated,

Plaintiff, : OPINION AND ORDER
76 Civ. 3006(KTD)

-against-

J. HENRY SMITH, et al.,

Defendants.

- X

APPEARANCES:

Brooklyn Legal Services Corp. B
Attorneys for Plaintiff,
By: John C. Gray, Jr., Esq.
Toby Golick, Esq.
Gretchen L. Sprague, Esq.

Simpson Thacher & Bartlett
Attorneys for Defendant Jane D. Edwards
By: Ronald L. Ginns, Esq.

Kevin Thomas Duffy, D. J.

Gwendolyn Shelton, the plaintiff in this action is the mother of four children. In 1973, Mrs. Shelton executed forms which authorized the New York City Commissioner of Social Services to place her son James, age 3, and Alexander, age 6, in the care of an authorized agency. (The forms used by the City have not been submitted to this Court). The City agency placed the children with Spence-Chapin Services to Families

and Children ("Spence-Chapin") which in turn found foster homes for the children. Alexander was returned to Mrs. Shelton in June of 1974 but was again placed with Spence-Chapin in June, 1975.

It was also in June of 1975 that Mrs. Shelton began experiencing difficulty in arranging visits through Spence-Chapin. The agency put off visits for reasons such as illness of the children and the difficulty of having the foster parent bring in the children. Finally, at a December, 1975 meeting with personnel from Spence-Chapin, Mrs. Shelton was told that she could no longer visit the children and that the agency would seek to have the children freed for adoption.

An action is now pending in New York State Family Court, New York County to terminate Mrs. Shelton's parental rights on the ground of abandonment of James and permanent neglect of Alexander. (B-2894/76 and B-2895/76). A hearing in that action is scheduled for August 24, 1976.

Mrs. Shelton does not challenge the right of defendants to commence the Family Court proceeding. Rather she argues that the failure of Spence-Chapin and other defendants to provide a hearing prior to terminating her visitation rights is violative of her rights under the first, ninth and fourteenth amendments and the Social Security Act 42 U.S.C. §§601, 608, and 625, 1397(a)(1)(c).

Plaintiff claims that New York Social Services Law §383.2 and other sections of New York law authorize the agency to terminate visiting rights without a hearing.[1] She now seeks class certification under Rule 23, Fed.R.Civ.P., the convening of a three judge court pursuant to 28 U.S.C. §2281 and §2284 and a judgment declaring section 383.2 unconstitutional. She also seeks an order "[e]njoining defendants from denying visiting rights to plaintiff, and directing defendants to arrange visits between plaintiff and her children in foster care, during the pendency of this action...."

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[1] N.Y. Social Service Law §383.2 provides in part:

> "The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child...."

Although the affidavit in support of plaintiff's motion refers to a challenge to N.Y.Family Court Act §611 and 614(c) and 18 N.Y.C.R.R.§450.9(c)(2), the complaint is silent as to them and the memorandum of law does not argue their unconstitutionality. These sections govern the permanent neglect proceedings and are not germane to the issue of a pre-termination hearing.

I find that I must abstain from consideration of this action until all state proceedings are completed.[2] First, the relief sought against Mrs. Shelton in the Family Court action is the termination of all parental rights. If that application is granted, the action now before me will be moot for want of a plaintiff with proper standing.[3]

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[2] Apart from the other possible barriers to the convening of a three-judge court, none is required in light of my decision to abstain. The Second Circuit has ruled that a single judge may decline to exercise jurisdiction under the abstention doctrine even though the case would otherwise be a proper one for the convening of a three-judge court. Reilly v. Doyle 482 F.2d 123, 127 (2d Cir.1973).

[3] That the action against Mrs. Shelton is civil rather than criminal does not preclude abstention. Ahrensfeld v. Stephens, 44 U.S.L.W.2318 (December 12,1975).

Second, although the statutes are challenged on vagueness grounds, plaintiff has cited no state court decision holding that the challenged sections empowers defendants to deny visitation rights without a hearing. Since the challenged section is totally silent on the question, the state court may well conclude as a matter of statutory construction that a pre-termination hearing is required. It is also possible that the court may find that while the statute does not require a hearing, other provisions of state law do mandate a hearing. A similar situation was recently before the Supreme Court in Boehring v. Indiana State Employees Ass'n, Inc., 44 U.S.L.W. 3275 (November 3, 1975). There the plaintiff had brought an action under 42 U.S.C. §1983 alleging that the state's denial of a hearing prior to termination of her employee status violated her constitutional rights. Finding state law to be silent on the question of a hearing, the district court declined to exercise jurisdiction until after an interpretation by a state court. The Court of Appeals reversed holding that since the statute did not expressly provide for a hearing, there were no open issues of state law to be decided. The Supreme Court reversed the Court of Appeals and concluded that although the statute did not address itself to the question of a hearing, a state court

might construe the statute to require one and thereby avoid the constitutional issue. It is clear to me that, as in Boehring, there are unresolved questions of state law which must first be passed upon by a state court.[4]

In considering whether a federal court should abstain, the liklihood of irreparable injury from non-intervention a proper consideration. Younger v. Harris 401 U.S. at 37 (1971) Here the plaintiff has moved for a preliminary injunction alleging such irreparable injury. At first glance the inability of a mother to visit her children while lawsuits are conducted might appear to be the type of injury which would warrant injunctive relief. However, this Court is of the opinion that there is a greater possibility of emotional harm to the two children, Alexander and James, in mandating them to visit their natural mother on the eve of a possible permanent separation. According to the recently published study, Beyond the Best Interests of the Child by Goldstein, Freud & Solnit, upon which plaintiff relies for other purposes, a permanent separation between natural parent and child is best made in a manner which is total and complete and leaves the least opportunity for the child to

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[4] This court expresses no opinion as to whether plaintiff's claims can or should be raised in the pending Family Court action or whether a separate action would be necessary.

dwell on the relationship about to be terminated. For this reason, among the others, I am unwilling to interfere with the status quo until after the Family Court has spoken.

Rather than dismiss the action, jurisdiction will be retained until all state proceedings are completed. See Zwickler v. Koota, 389 U.S.241,244n.4(1967); Reid v. Board of Educ., 453 F.2d 238(2d Cir.1971). The case is placed on the suspense calendar. The parties are directed to report to this court on the status of all state proceedings ninety days from the date of this order.

SO ORDERED.

/s/ Kevin Thomas Duffy

U.S.D.J.

New York, New York
August 11 , 1976

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

ADDIE COLLINS, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 2007 Surf Avenue, Brooklyn, New York.

That on the 24th day of September, 1976, deponent served the within BRIEF FOR APPELLANTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK upon the attorneys for Appellees each listed below, being the address designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York, addressed to:

SIMPSON, THACHER & BARTLETT
1 Battery Park Plaza
New York, New York 10004
Attn: RONALD L. GINNS

LOUIS J. LEFKOWITZ, Attorney General
2 World Trade Center
New York, New York
Attn: SETH GREENWALD

SHELTON v. SMITH, No. 76-7423

Affidavit of Service by Mail (Cont'd)

W. BERNARD RICHLAND
Corporation Council
Municipal Building
Centre & Chambers Streets
New York, New York 10007
Attn: GAYLE REDFORD

Addie Collins
ADDIE COLLINS

Sworn to before me this

24th day of September, 1976

Toby Golick
NOTARY PUBLIC

TOBY GOLICK
NOTARY PUBLIC, State of New York
No. 31-6583750 - New York County
Commission Expires March 30, 19 78